

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

**DEC 12 2005**

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

TIMOTHY CHARLES MILLER,

Petitioner - Appellant,

v.

MAGGIE MILLER-STOUT,

Respondent - Appellee.

No. 04-35542

D.C. No. CV-03-00234-RHW

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Eastern District of Washington  
Robert H. Whaley, District Judge, Presiding

Submitted December 5, 2005<sup>\*\*</sup>

Before: GOODWIN, W. FLETCHER and FISHER, Circuit Judges.

Timothy Charles Miller appeals from the district court's dismissal of his 28 U.S.C. § 2254 petition as time-barred. We have jurisdiction pursuant to 28 U.S.C.

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§ 2253. We review de novo, *Nardi v. Stewart*, 354 F.3d 1134, 1140 (9th Cir. 2004), and we affirm.

Miller contends that he is entitled to equitable tolling because he was incapacitated for two six-month periods following assaults he suffered in custody. Even accepting Miller's contention as true, we conclude that the petition was still untimely. *See* 28 U.S.C. § 2254(d). Because Miller has not shown that the factual predicate of the claims presented could not have been discovered earlier through the exercise of due diligence, Miller has not shown that the petition was timely pursuant to 28 U.S.C. § 2244(d)(1)(D).

Miller also contends that he is entitled to equitable tolling because he has acquired new evidence of "actual innocence." This contention fails because Miller has not shown that the evidence was not previously available or that the evidence is "so strong that a court cannot have confidence in the outcome of the trial." *See Schlup v. Delo*, 513 U.S. 298, 316 (1995).

Miller's motion to expand the certificate of appealability is denied.

**AFFIRMED.**